U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 February 2004

CASE NO.: 2004-STA-7

In the Matter of:

MARK E. HOWICK,
Complainant

v.

CAMPBELL-EWALD COMPANY,
FRED BATTEN, ESQ. AND CLARK
HILL, LLC.
Respondent

ORDER TO SHOW CAUSE

This proceeding arises from a claim filed under the employee protection provisions of Section 31105 of the Surface Transportation & Assistance Act of 1982 (STAA). Complainant alleges that the motion requesting a "gag order" filed by Campbell Ewald's legal counsel in a previous administrative proceeding[1] constitutes a violation of whistleblower laws.

On September 18, 2003, Administrative Law Judge Phalen issued a Recommended Decision and Order dismissing the complaint in Case Number 2003-STA-6.[2] On September 19, 2003, the respondent submitted a motion objecting to ex parte communications by the complainant and his legal counsel and requested a "gag order" during the pendency of the matter before the court. On September 19, 2003, the Complainant filed a complaint with the Director of the Office of Investigative Assistance for OSHA alleging the Respondent's September 19, 2003 motion constituted a violation of the Department of Labor's whistleblower laws and requested his complaint be filed under STAA and TSCA. Just after ALJ Phalen's decision, the respondent withdrew its September 19, 2003 motion on September 24, 2003. On October 28, 2003, OSHA dismissed the STAA complaint in light of the fact that the Respondent withdrew its September 19, 2003 motion.

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[1] *Mark E. Howick v. Campbell-Ewald Company*, 2003-STA-6 (ALJ, Sept. 18, 2003).

[2] Judge Phalen dismissed the complaint based on a pattern of delay and malfeasance by complainant and his counsel. Judge Phalen illustrated Complainant's lengthy delay in making himself available for deposition and in answering discovery requests. The ALJ also explained Complainant's attorney's repeated violations of orders, including filing frivolous motions, filing letters instead of motions, making late requests, and failure to be prepared at the start of the hearing. The ALJ repeatedly warned the Complainant that he was dangerously close to having his complaint dismissed.

On November 5, 2003, Complainant appealed the OSHA findings and requested a formal hearing. I was assigned the case on December 4, 2003. A hearing is scheduled for April 6, 2004 in Toledo, Ohio.

In *Somerson v. Mail Contractors of America*, 2003-STA-11 (ALJ, Jan. 10, 2003), Complainant's counsel, Mr. Slavin, also complainant's counsel in the above-captioned matter, filed a claim under the STAA against the employer's attorney for a motion filed in a previous STAA case. Respondent moved to dismiss because complainant failed to assert a *prima facie* allegation of an adverse employment action. Associate Chief Judge Burke issued a Recommended Decision and Order Dismissing the complaint. Judge Burke stated, in pertinent part:

> The present complaint, asserting that the motion for protective order is an adverse employment action under the STAA, is completely specious. The complaint fails to allege the essential elements of a violation of the whistleblower protection provisions of the STAA. To prevail under the STAA, it is necessary to prove that the Complainant was an employee of a covered employer, the complainant engaged in protected activity, the Complainant thereafter was subject to adverse action regarding his employment, Respondents knew of the adverse activity when it took the adverse activity, and the protected activity was the reason for the adverse action. First, the motion for protective order filed by Mail Contractors of America, considered and granted by Judge Miller, is not an adverse employment action in retaliation for protected activity under the STAA. Judge Miller found that the "*ad hominem* communications" which were to be prohibited by the protective order "have nothing to do with safety or fatigue as it applies to truckers, or indeed anything except implicit threats, and scurrilous insults in the nature of harassment, [and] are not protected activity in issue under the STAA." *Recommended Decision and Order Dismissing Complaint and Certifying facts Relating to Intimidation and Harassment of Witnesses and Counsel to Federal District Court*, at 4, fn.3 [*Somerson v. Mail Contractors of America, Inc.*, 2002-STA-44 (ALJ, Dec. 16, 2002)]. Second, the attorneys representing Mail Contractors of America before Judge Miller are not Complainant's employers under the STAA. *See Saporito v. Florida Power & Light Co.*, 1994-ERA-35 (ARB July 19, 1996). To be considered an employer under the STAA the attorneys would have to be employers operating a commercial motor carrier. 49 U.S.C. § 31101(3)(A), 29 C.F.R. § 1978. 100 *et seq.* (Emphasis added).

Somerson v. Mail Contractors of America, 2003-STA-11 (ALJ, Jan. 10, 2003). On review, the Administrative Review Board stated: complainant failed "to adduce evidence in support of an essential element of his complaint, i.e., that the filing of the request for a protective order constituted 'discipline or discriminate[ion] against an employee regarding pay, terms, or privileges of employment.'" *Somerson v. Mail Contractors of America*, ARB No. 03-042 (ARB, Oct. 14, 2003) (Final Order Striking the Complainant's Brief and Dismissing the Complaint).

Additionally, Claimant's counsel argues that "gag orders" are illegal in whistleblower cases. Counsel cites *Connecticut Light & Power Company v. Secretary of the United States Department of Labor*, 85 F.3d 89 (2d Cir. 1996), for the proposition that "employer asking for illegal Gag Order in settlement violates whistleblower laws." *Letter from Mr. Slavin to Director*

Office of Investigative Assistance, OSHA (dated September 19, 2003). Counsel's interpretation of *Connecticut Light & Power Company* is, at best, a broad overstatement of the Circuit Court's holding.

Connecticut Light & Power Company involved a settlement agreement in a whistleblower case that included provisions restricting the complainant's ability to appear as a witness or a party in any judicial or administrative proceeding in which Connecticut Light and Power Company was a party. *Id.* at 92. Claimant's counsel uses this case for the proposition that "gag orders" are illegal per se. *Connecticut Light* involved "particularly restrictive" provisions. The provision at issue restricted the employee's right to report violations to regulatory agencies. *Id.* at 97. The court did not imply, much less explicitly state, that "gag orders" violate whistleblower laws. Wherefore,

ORDER

IT IS HEREBY ORDERED that both parties are directed to show cause, in writing, within **ten (10) days** of the issuance of this order why the above-captioned matter should or should not be immediately dismissed with prejudice for failure to state a claim upon which relief can be granted or why a summary decision denying the complaint should not be issued.

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RICHARD A. MORGAN
Administrative Law Judge